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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 119.

QUONG WING, PLAINTIFF IN ERROR,

vs.

THOMAS B. KIRKENDALL, AS TREASURER OF THE COUNTY OF LEWIS AND CLARK, STATE OF MONTANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED AUGUST 26, 1909.

(21,804.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 22, 1911.

1 Supreme Court of the United States.

QUONG WING, Plaintiff in Error,
vs.
THOMAS B. KIRKENDALL, as Treasurer of the County of Lewis and Clark, State of Montana, Defendant in Error.

In Error to the Supreme Court of the State of Montana.

Transcript of Record.

2 In the Supreme Court of the State of Montana.

QUONG WING, Respondent,
vs.
THOS. B. KIRKENDALL, as Treasurer of the County of Lewis and Clark, State of Montana, Appellant.

A. P. Heywood, Esq., County Attorney of the County of Lewis and Clark, Attorney for Appellant.
Wight & Pew, Attorneys for Respondent.

Transcript on Appeal.

From the District Court of the First Judicial District of the State of Montana in and for Lewis and Clark County.

3 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clark.

QUONG WING, Plaintiff,
vs.
THOS. B. KIRKENDALL, as Treasurer of the County of Lewis and Clark, State of Montana, Defendant.

Complaint.

Plaintiff complains of defendant and alleges:

1. That plaintiff is now, and at all times hereinafter mentioned was a resident of the city of Helena Lewis and Clark County, State of Montana; that at all of said times plaintiff was and still is engaged in the laundry business, other than the steam laundry business; that is to say, said plaintiff has been at all of said times and still is engaged in the business of washing, drying and ironing and otherwise laundering wearing apparel, linens, and other clothing and cloth goods, for hire; that in the operation of said laundry

business said plaintiff employs and uses only hand power for
4 the propulsion and operation of the implements and appliances used in carrying on said business. That plaintiff is a male person, and that he employs only male persons in said laundry business.

2. That said defendant Thos. B. Kirkendall is and at all times hereinafter mentioned was the duly elected, qualified and acting Treasurer of the said County of Lewis and Clark; that on the 7th day of October, 1908, said defendant, as such Treasurer, demanded of this plaintiff the sum of Ten Dollars ($10.00) as and for license for the privilege of carrying on and conducting said laundry business in said County and State aforesaid, for the period of three months from and after the 17th day of July 1908; that said defendant then and there, as such Treasurer, at the time of making said demand, threatened to then and there cause said plaintiff to be arrested and prosecuted unless he, the said plaintiff, should then and there pay to said defendant as such Treasurer, the sum of money so demanded, as and for such license for the privilege of conducting said laundry business. That this plaintiff then and there believed that said defendant would carry out his said threats unless he, the said plaintiff, should then and there pay to said defendant as such treasurer, the sum of money so demanded as aforesaid; and
5 that acting under said threats, and under said belief, plaintiff then and there paid under protest the said sum of Ten Dollars to said defendant as such Treasurer, as so demanded as hereinabove fully set forth; that at the said time of said demand, said license was, ever since said demand was so made has been, and still is deemed unlawful by this plaintiff, and but for the fear of arrest and prosecution as above set forth, this plaintiff would have refused and continued to refuse to pay the same.

3. Plaintiff alleges that said money so demanded as aforesaid by said defendant and paid under protest as aforesaid by plaintiff, was so demanded and collected for the purpose of defraying the general governmental expenses of said County of Lewis and Clark and of said State of Montana, and for no other purpose.

4. Plaintiff further alleges that at all the times herein mentioned divers persons have been and still are carrying on the steam laundry business in the said County of Lewis and Clark; that is to say, said divers persons have at all said times been and still are engaged in the business of washing, drying, ironing and otherwise laundering wearing apparel, linens, and other clothing and cloth goods for hire, and that in the operation of said laundry business said per-
6 sons use steam power for the propulsion and operation of the implements and appliances used in carrying on said steam laundry business.

5. That none of said divers persons referred to in paragraph 5 hereof are, nor have they or any of them at any of the times herein mentioned been required to pay to said Treasurer, by any law of the State of Montana, or otherwise or at all, any sum of money as a license or otherwise or at all for the privilege of carrying on said steam laundry business.

6. Plaintiff further alleges that there is no difference whatever between the said business of said plaintiff and the business of said divers persons so operating steam laundries;—that is to say, the said plaintiff and said divers persons are each engaged in identical business, to-wit, the washing, drying, ironing and otherwise laundering of wearing apparel, linens, and other clothing and cloth goods for hire,—except that the plaintiff employs different agencies in the said business, that is to say, this plaintiff uses only hand power for the propulsion and operation of the implements and appliances used in his said laundry business, while said divers persons use steam power for the propulsion and operation of the implements and appli-
7 ances used in their said steam laundry business. That said divers persons employ both males and females in said laundry business.

7. Plaintiff further alleges that there are women engaged in the laundry business in said county of Lewis and Clark where not more than two women are engaged or employed or kept at work; that the said laundry business so engaged in by said women is the same kind of laundry business so engaged in by this plaintiff as fully set forth in paragraph 1 hereof; that said women are not nor are any of them required by any law of the State of Montana, nor otherwise or at all, to pay any sum of money whatever to said defendant as such Treasurer or otherwise or at all for the privilege of carrying on said business.

8. Plaintiff alleges that said defendant so demanded and received said money from this plaintiff as hereinabove set forth, under and by virtue of a certain statute of the said State of Montana, passed by the Fifth Legislative Assembly of said State, and approved by the Governor of said State, being Section 2776 of the Revised Codes of Montana of 1907, a true copy of which said statute is as follows, to-wit:

"2776." Every person engaged in laundry business, other
8 than the steam laundry business shall pay a license of Ten Dollars per quarter provided that this Act shall not apply to the women engaged in the laundry business, where not more than two women are engaged or employed or kept at work, and said license shall be for one place of business only."

9. That there is no other statute or law of the said State of Montana requiring the payment of a license fee nor of any fee or payment of any kind from any person for the privilege of conducting or operating a laundry business of any kind, class, character or description.

10. Plaintiff alleges that said statute is invalid, unconstitutional and void, in that it is repugnant to and in conflict with the Constitution of the United States, and that the validity of said statute on the said ground of its being repugnant to and in conflict with said Constitution is drawn in question in this suit; that the said statute and said act of said defendant in so demanding and receiving said moneys from this plaintiff as hereinabove set forth were and are a denial of the equal protection of the laws guaranteed to this plaintiff by the Constitution and treaties of the United States of America.

Wherefore, plaintiff prays that said statute of the said State
9 of Montana be held and adjudged to be invalid, unconstitutional and void, in that the same is repugnant to and in conflict with the Constitution of the United States of America, and in conflict with and repugnant to the Constitution of the State of Montana; for judgment against the said defendant for the return of said Ten Dollars so paid as above set forth, for his costs, and for such other and further relief as may be meet and proper in the premises.

WIGHT & PEW,
Attorneys for Plaintiff.

(Complaint duly verified by Quong Wing.)
(Filed October 9th, 1908.)

Title of Court and Title of Cause.

Demurrer.

Now comes the defendant and demurs to the plaintiff's complaint on file herein, and for cause of demurrer alleges: That said complaint does not state facts sufficient to constitute a cause of action.

A. P. HEYWOOD,
Attorney for Defendant.

Service of a copy of the foregoing demurrer admitted this thirteenth day of November, A. D. 1908.
10 WIGHT & PEW,
Attorneys for Plaintiffs.

(Demurrer filed November 13th, 1908.)

Title of Court and Title of Cause.

Order Overruling Demurrer to Complaint.

This matter coming on to be heard upon the issues of law raised by the demurrer of defendant to the complaint herein, and the arguments of counsel for the respective parties having been heard by the court, and the Court being fully advised in the premises, it is

Ordered that the defendant's demurrer to plaintiff's complaint herein be, and the same is hereby overruled.

Done in open Court this 21st day of November, 1908.

By the Court,

THOS. C. BACH, *Judge.*

Title of Court and Title of Cause.

Judgment.

This matter having heretofore come on regularly to be heard upon the demurrer of the defendant to plaintiff's complaint,
11 and the Court having overruled said demurrer, and the defendant being now present in Court by his counsel, A. P.

Heywood, Esq., County Attorney, and said defendant, through his said counsel, in open Court electing to stand upon his demurrer to the complaint.

Now, Therefore, upon motion of Messrs. Wight & Pew, Attorneys for above named plaintiff, it is ordered, adjudged, and decreed that judgment be entered herein against said defendant Thos. B. Kirkendall, as Treasurer of the said County of Lewis & Clark, in accordance with the prayer of the complaint on file herein;

Wherefore, by reason of the law and the premises, it is ordered, adjudged and decreed that the plaintiff herein, Quong Wing, do have and recover from said defendant as such Treasurer, the sum of Ten Dollars paid to said Treasurer as set forth in said complaint, together with plaintiff's costs and disbursements amounting to the sum of Seven and 50/100 Dollars.

The Clerk of this Court will enter judgment in the above form.

By the Court.

THOS. C. BACH, *Judge.*

Done in open Court November 21st, 1908.

Endorsed: Judgment Roll filed Nov. 21st 1908.

12 Title of Court and Title of Cause.

Notice of Appeal.

To the clerk of the above entitled court and to the above named plaintiff and to Messrs. Wight & Pew, attorneys for above named plaintiff:

Please take notice that the defendant in the above entitled action hereby appeals to the Supreme Court of the State of Montana from the judgment made and entered in said cause on the 21st day of November, 1908, in favor of the plaintiff and against the defendant herein, and from the whole thereof.

A. P. HEYWOOD,
Attorney for Defendant.

Due and timely service of above notice of appeal is hereby admitted and receipt of a copy thereof acknowledged this 25th day of November, 1908.

WIGHT & PEW,
Attorneys for Plaintiff.

(Filed November 25th, 1908.)

13 Title of Court and Title of Cause.

Certificate of Clerk to Transcript.

STATE OF MONTANA,
County of Lewis and Clark, ss:

I, Sidney Miller, Clerk of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, do hereby certify that the foregoing transcript contains a full, true, correct and compared copy of the Judgment Roll, Order Overruling defendant's Demurrer to the Complaint herein, and Notice of Appeal, in the case of Quong Wing, Plaintiff, vs. Thos. B. Kirkendall, as Treasurer of the County of Lewis and Clark, State of Montana, as the same appear of record and in the files of my office.

In witness whereof I have hereunto set my hand and affixed the seal of the above entitled Court this 30th day of November, A. D. 1908.

[Seal of said Court.]

SIDNEY MILLER,
Clerk of the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark,
By GEO. E. BAYHA,
Deputy Clerk.

14 *Minutes of Supreme Court.*

Twenty Sixth Day of March Term, 1909, Saturday, April 24th, A. D. 1909.

Court convened pursuant to recess.

Present:

The Hon. Theo. Brantly, Chief Justice.
" " Henry C. Smith, Associate "
" " Wm. L. Holloway, " "
John T. Athey, Clerk.
Marsh N. Race, Marshal.

And the following (among other) proceedings were had, to-wit:

2656.

QUONG WING, Pl'ff and Resp't,
v.
THOMAS B. KIRKENDALL, as Treasurer, Def't and App'l't.

This cause this day came on for the judgment and decision of the Court.

Whereupon, on consideration, it is now here ordered and adjudged by this court that the judgment of the district court of Lewis and Clark County is reversed, and the cause is remanded with directions to vacate the order overruling the defendant's demurrer to the complaint and to enter in lieu thereof an order sustaining the same. At the cost of the respondent.

Opinion by Mr. Justice Smith, Mr. Chief Justice Brantly and Mr. Justice Holloway concurring.

15 *Opinion.*

STATE OF MONTANA:

In the Supreme Court, March Term, 1909.

No. 2656.

QUONG WING, Plaintiff and Respondent,

-v.-

THOMAS B. KIRKENDALL, as Treasurer of the County of Lewis and Clark, State of Montana, Defendant and Appellant.

Submitted April 10, 1909; Decided April —, 1909.

Filed April 24th, 1909. John T. Athey, Clerk.

16 Mr. Justice SMITH delivered the Opinion of the Court.

Plaintiff brought this action in the district court of Lewis & Clark county to recover the sum of $10 which was exacted of him by the defendant as treasurer of that county. The complaint alleges that plaintiff is engaged in what may be termed the hand-laundry business; that there are steam-laundries in operation in the county, the proprietors of which are not required to pay a license; that there is no difference between the plaintiff's business and that of a steam laundry "except that the plaintiff employs different agencies in the said business; that is to say, this plaintiff uses only hand power for the propulsion and operation of the implements and appliances used in his business, while said (other) persons use steam power * * * and employ both males and females in said laundry business;" that in addition to the steam-laundries there are women engaged in the laundry business in the county "where not more than two women are engaged or employed or kept at work," which business is the same as that of the plaintiff; that said women are not required to pay any money for the privilege of carrying on said business; that said license was demanded by the defendant treasurer by virtue of section

17 2776, Revised Codes, and was collected solely for the purpose of defraying the general governmental expenses of Lewis & Clark county and the state of Montana; that section 2776, Revised Codes, is the only law on the statute books requiring the payment of a license for the privilege of conducting the laundry business. The

section referred to reads as follows: "Every person engaged in laundry business, other than the steam laundry business shall pay a license of Ten Dollars per quarter provided that this Act shall not apply to the women engaged in the laundry business, where not more than two women are engaged or employed or kept at work, and said license shall be for one place of business only." The district court overruled a general demurrer to the complaint, and, afterwards, in default of an answer, entered judgment in favor of the plaintiff. From that judgment the defendant treasurer has appealed. It is claimed by the plaintiff that he is denied the equal protection of the laws, guaranteed him by the Constitution of the United States.

1. Let us first assume, for the purpose of this inquiry, without deciding, that section 2776 classifies those engaged in the laundry business. This question was expressly reserved in State v. French,
17 Mont. 54. We assume, also, that this license tax is im-
18 posed for the sole purpose of raising revenue for general governmental purposes; it is so alleged in the complaint, and the court had little doubt of the fact when the opinion in State v. French, supra, was prepared, under a somewhat similar statute.

We may not declare this Act unconstitutional unless it is clearly so. (State v. Camp Sing, 18 Mont. 128; State ex rel. Quintin v. Edwards, Mayor, 38 Mont. —, 99 Pac. 940.) The legislature is presumed to have exercised a reasonable discretion in making the classification, and the courts ought not to interfere with the action of this co-ordinate branch of the government, until the plaintiff, upon whom rests the burden of proof, clearly shows that he is denied the equal protection of the laws. (State v. McKinney, 29 Mont. 375.) Every intendment is in favor of the validity of the legislative action. In other words, the classification is presumed to be reasonable. (See City of Fayetteville v. Carter, 52 Ark. 301; Van Hook v. City of Selma, 70 Ala. 361; Littlefield v. State, 42 Neb. 223, where somewhat analogous presumptions were considered.) If on the face of the measure the classification appears to be arbitrary and unreasonable, or unjust, or no classification at all, a different question
19 is presented. Even assuming that section 2776, Revised Codes, classifies laundries, we are not disposed to hold that the classification made is manifestly arbitrary or unreasonable; it certainly is not obviously so on the face of it. If such classification is made, then steam-laundries are placed in one class and hand-laundries in another. We do no- regard the exemption of women from the operation of the statute, in certain cases, as amounting to a classification, for the reasons hereinafter stated. The fact that both steam-laundries and hand-laundries obtain the same results is not controlling. For aught we know there may be good and sufficient reasons for believing that the difference between the two classes, based upon the power employed in conducting the business, is fundamental and all-pervading. We cannot say that this classification is any more arbitrary or unwarrantable than would be a division of gas-lighting plants and electric-lighting plants into two classes. Assuming that it might appear to the members of this court that steam-

laundries should pay a larger license fee than hand-laundries, would the court be justified in declaring a statute unconstitutional which exacted the same fee from both? Or suppose the matter were reversed and the legislature should provide that only steam-
20 laundries must pay a license, could it then be successfully contended that persons engaged in that business were discriminated against and denied the equal protection of the laws? We do not think so. The legislature probably had some good reason for exempting steam-laundry proprietors from the payment of license, either permanently, or for the time being. In the case of East St. Louis v. Wehrung, 46 Ill. 392, it was held that an ordinance which did not "discriminate as between persons having equal facilities for profit" was not objectionable. (See, also, Tulloss v. City of Sedan, 31 Kas. 165; City of Cherokee v. Fox, 34 Kas. 16.) The supreme court of the United States, in Magoun v. Illinois T. & S. Bank, 170 U. S. 283, said: "There is no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities: And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things." (See, also, Clark v. Titusville, 184 U. S. 329.)

But we doubt whether this statute attempts to classify laundries. The Constitution gives the power to impose a license tax upon persons doing business in this state. (Sec. 1, Article XII, Constitution.) The legislature is not required to tax all occupations
21 equally or uniformly. (State ex rel. Sam Toi, v. French, 17 Mont. 54.) Therefore, it appears to follow that the legislature has power to single out the proprietors of hand-laundries and compel them to pay a license, and if such license falls upon all hand-laundry proprietors alike, no one of them is aggrieved. No suggestion is made that this law is not uniform as to all hand-laundry proprietors, either on its face or in its application, except in so far as it exempts certain women; and in all other respects it appears to us to be uniform and reasonable. "If the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates 'equally and uniformly upon all persons in similar circumstances.'" (Magoun v. Illinois T. S. Bank, 170 U. S., supra, 296.) The supreme court of Louisiana, in Kaliski v. Grady, 25 La. Ann. 576, said: "It is contended that the (law) is unconstitutional because it levies a tax of eighty-five dollars on persons dealing in distilled liquor or retailing spirituous liquors on land, while a tax of only fifty dollars is levied on persons following a like occupation on steamboats, although they may only ply within the limits of a single parish of the state. We fail to see the force of this proposition. The same amount of tax is levied upon
22 all persons pursuing a certain traffic in a certain way, and we do not see how there can be any unjust discrimination in this."

2. It is contended that the law is invalid because one or two women engaged in the laundry busines are not required to pay a license. This provision furnishes no just cause for complaint on the

part of the plaintiff. We all know that in every community are to be found women, who, through misfortune, are obliged, as the common expression is, to take in washing for a living—some are widows, some have been abandoned, others are caring for invalid husbands, and all, generally, have small children to support. Probably a bare living is all that is gained by them. Such women do not compete with those laundries which are operated for profit, any more than do those who, from necessitly or choice perform the laundry work for one private family. They are not to be classed with men who are engaged in the business of conducting public laundries. The legislature in its wisdom has seen fit to say to them, "So long as you do not compete with public laundries you need pay no license; but in case you manifest an intention to enter into competition by employing additional help, you must thereafter pay the same fee as
23 do men who are likewise engaged." In thus enacting, the legislature but followed the natural dictates of humanity, and seems to have been actuated by sentiments altogether praiseworthy and commendable.

Mr. Justice Brewer, of the Supreme Court of the United States, has said this: "History discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs, it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of men.

* * * Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her." (Muller v. Oregon, 28 Sup. Ct. Rep. 324.) On such high authority we are content to rest our opinion on this branch of the case.

The judgment of the district court of Lewis and Clark county is reversed, and the cause is remanded with directions to vacate the order overruling the defendant's demurrer to the complaint, and to enter, in lieu thereof, an order sustaining the same.

Reversed and Remanded.

HENRY C. SMITH,
Associate Justice.

We concur:

THEO. BRANTLY,
Chief Justice.
WM. L. HOLLOWAY,
Associate Justice.

Minutes of Supreme Court, State of Montana.

Forty First Day of March Term, 1909, Saturday, May 22", A. D. 1909.

Court convened pursuant to recess.

Present:

The Hon. Theo. Brantly, Chief Justice.
" " Henry C. Smith, Associate "
Wm. L. Holloway, " "
John T. Athey, Clerk.
Marsh N. Race, Marshal.

And the following proceedings were had (among others) to-wit:

2656.

QUONG WING, Respondent,
v.
THOMAS B. KIRKENDALL, County Treasurer, Appellant.

Respondent's petition for a rehearing herein, heretofore submitted is after due consideration by the Court denied.

27 In the Supreme Court of the State of Montana.

QUONG WING, Respondent and Plaintiff in Error,
vs.
THOMAS B. KIRKENDALL, as Treasurer of the County of Lewis and Clark, State of Montana, Appellant and Defendant in Error.

Assignment of Error.

Comes now Quong Wing, above named plaintiff in error and respectfully shows and alleges to the above entitled Court, that in the record and proceedings in the above entitled cause, the Supreme Court of the State of Montana erred to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice and against the right of the plaintiff in error herein, in the following particulars:

I.

The Court erred in holding that Section 2776 of the Revised Codes of Montana is not repugnant to and in conflict with the Constitution of the United States, and in holding that the collection of the license fee therein provided for from plaintiff in error by said defendant in error is not a denial of the equal protection of the laws.

28 II.

The Court erred in not holding that said Section 2776 of the Revised Codes of Montana is repugnant to and in conflict with said United States Constitution, and in not holding that the collection from plaintiff in error of the license fee therein provided for by defendant in error is a denial to plaintiff in error of the equal protection of the laws.

III.

The Court erred in reversing the judgment of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and directing said District Court to vacate the order overruling the demurrer to the complaint and directing the entry of an order sustaining the same.

IV.

The Court erred in not affirming the judgment of said District Court.

Wherefore, for these and other manifest errors appearing in the record and proceedings herein, the said plaintiff in error, Quong Wing, prays that the judgment of said Supreme Court of the State of Montana be reversed and set aside and held for naught, and that

judgment be rendered for plaintiff in error, granting him his
29 rights under the Constitution of the United States of America, and that plaintiff in error also prays for his costs.

WIGHT & PEW,
Attorneys for Plaintiff in Error.

Dated July 6th, 1909.

30 In the Supreme Court of the State of Montana.

QUONG WING, Respondent,
vs.
THOMAS B. KIRKENDALL, as Treasurer of the County of Lewis and Clark, State of Montana, Appellant.

Petition for Writ of Error.

To the Honorable the Justices of the Supreme Court of the State of Montana:

Comes now the above named respondent, Quong Wing, and respectfully shows unto this Honorable Court:

I.

That the above entitled cause came on regularly to be heard by this Honorable Court upon the appeal of the above named appellant from the judgment of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, on or about the 10th day of April, 1909; that thereafter, to-wit, on the 24th day of April, 1909, this Honorable Court duly rendered its decision in said cause; which said decision was against the contentions of respondent, petitioner herein, and in favor of
31 the said appellant. That thereafter, to-wit, on the 8th day of May, 1909, above named respondent, your petitioner, duly filed his petition for a rehearing of said cause, which said petition was thereafter, to-wit, on the — day of May, 1909, by this Honorable Court denied; the said decision of this Honorable Court in this cause thereupon becoming final.

II.

That said respondent, your petitioner, was and is aggrieved by the said decision of this Honorable Court, in this: that in said cause there was and is drawn in question a right, privilege and immunity claimed by your petitioner under the Constitution of the United States of America, and specially set up and claimed under said Constitution, to-wit, that your petitioner is denied the equal protection of the laws by the statute of the State of Montana involved herein, and by the action of said appellant herein complained of; that the decision of this Honorable Court was against the right, privilege and immunity so set up and claimed by your petitioner as aforesaid.

Wherefore, your petitioner prays that a writ of error to the said Supreme Court of the State of Montana be allowed your petitioner for the correcting of the errors complained of and that a duly authenticated transcript of the record, proceedings and papers herein
32 may be sent to the United States Supreme Court, at the City of Washington, District of Columbia. And your petitioner will ever pray.

WIGHT & PEW,
Attorneys for Petitioner.

Dated July 6th, 1909.

The writ of error prayed for in the foregoing petition is hereby allowed as prayed for, upon said Quong Wing filing with the Clerk of this Court a good and sufficient bond, conditioned according to law, in the sum of $500.00, said bond to be approved by a justice of this Court and to operate as a supersedeas.

Witness my hand and the seal of the Court this 6th day of July, 1909.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Attest:

[SEAL.] JOHN T. ATHEY,
Clerk of the said Supreme Court of the State of Montana.

33 In the Supreme Court of the State of Montana.

QUONG WING, Respondent and Plaintiff in Error,
vs.
THOMAS B. KIRKENDALL, as Treasurer of the County of Lewis and Clark, State of Montana, Appellant and Defendant in Error.

Bond on Writ of Error.

Know all men by these presents, That we, the above named Quong Wing, plaintiff in error, as principal, and United States Fidelity & Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and duly licensed to do business in the State of Montana, as surety, are held and firmly bound unto the above named Appellant and Defendant in Error, in the Sum of Five Hundred Dollars ($500.00), lawful money of the United States of America, to the payment of which, well and truly to be made, the said principal and the said surety bind themselves, and their and each of their heirs, personal representatives
34 successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of July, 1909.

Whereas, in the above entitled cause, the Supreme Court of the State of Montana rendered its judgment on the 24th day of April,

1909, reversing the judgment of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and

Whereas a motion for rehearing of said cause was filed in said Supreme Court on the 8th day of May, 1909, and thereafter by the said Court denied; and

Whereas said Quong Wing seeks to prosecute his writ of error in the Supreme Court of the United States to reverse the judgment of the said Supreme Court of the State of Montana so rendered in the above entitled action by said Supreme Court of Montana as aforesaid, and

Whereas, the Chief Justice of said Supreme Court of the State of Montana has allowed said writ, provided said Quong Wing shall file or cause to be filed in the office of the Clerk of said Supreme Court of the State of Montana a good and sufficient bond in the sum of $500.00, said bond to act as a supersedeas;

Now, therefore, the condition of this obligation is such
35 that if the above named plaintiff in error, Quong Wing, shall prosecute his said writ of error to effect and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof the said Quong Wing has caused these presents to be executed on his behalf by his attorneys, and the said surety has caused its name and corporate seal to be affixed hereto and these presents executed on its behalf by its duly authorized attorney-in-fact, this 6th day of July 1909.

QUONG WING,
By WIGHT & PEW, *His Attorneys.*
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By C. O. PRICE, *Its Attorney-in-Fact.*

The foregoing bond is approved this 6th day of July, 1909.

[SEAL.] THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Attest:

[SEAL.] JOHN T. ATHEY,
Clerk of said Court.

I, John T. Athey, Clerk of the Supreme Court of the State
36 of Montana do hereby certify that the original of the bond of which the foregoing is a copy was duly lodged in my office on the 6th day of July, 1909.

Witness my hand and the Seal of said Court this 19th day of August, 1909.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

37 In the Supreme Court of the United States.

QUONG WING, Plaintiff in Error,
vs.
THOMAS B. KIRKENDALL, as Treasurer of the County of Lewis and Clark, State of Montana, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Montana, before you, at the April sitting of the October term, 1908, thereof, being the highest Court of law or equity of the said State, in which a decision could be had in the said suit between Quong Wing plaintiff, respondent and plaintiff in error, and said Thomas B. Kirkendall, as Treasurer of the County of Lewis and Clark, State of Montana, defendant, appellant and defendant in error, wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right, privilege and immunity specially set up and claimed under such clause of the said Constitution, a manifest error hath happened to the great damage of the said Quong Wing, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the rec-
38 ord and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of July, 1909.

Done in the City of Helena, County of Lewis and Clark, State of Montana, with the seal of the Circuit Court of the United States for the Ninth Circuit, District of Montana, attached.

[Seal United States Circuit Court, Dist. of Montana.]

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States
Ninth Circuit, District of Montana.

Writ allowed by
THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Attest:

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

I hereby certify that the plaintiff in error, at the time of filing the foregoing writ of error, deposited with me a true copy thereof for the defendant in error. JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

Dated July 6", 1909.

39 [Endorsed:] 2656. In the Supreme Court of the United States. Quong Wing, Plaintiff in Error, vs. Thomas B. Kirkendall, as Treasurer, Defendant in Error. Writ of Error. Filed Jul- 6, 1909. John T. Athey, Clerk Supreme Court, State of Montana. Wight & Pew, Attorneys at Law, Helena, Montana.

40 In the Supreme Court of the United States.

QUONG WING, Plaintiff in Error,
vs.
THOMAS B. KIRKENDALL, as Treasurer of the County of Lewis and Clark, State of Montana, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Thomas B. Kirkendall, above named defendant in error, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, District of Columbia, within sixty (60) days from the date hereof, pursuant to the writ of error filed in the office of the Clerk of the Supreme Court of the State of Montana, wherein Quong Wing is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Montana, this 6th day of July, 1909.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Attest:

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

41 We, the undersigned attorneys of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

ALBERT J. GALEN,
E. M. HALL,
Helena, Montana.

Dated July 6th, 1909.

42 [Endorsed:] No. 2656. In the Supreme Court of the United States. Quong Wing, Plaintiff in Error, vs. Thomas B. Kirkendall, as Treasurer, Defendant in Error. Citation. Filed Jul- 6, 1909. John T. Athey, Clerk Supreme Court, State of Montana. Wight & Pew, Attorneys at Law, Helena, Montana.

43 STATE OF MONTANA,
Office of Clerk of the Supreme Court, ss:

I, John T. Athey, Clerk of the Supreme Court of the State of Montana, do hereby certify that the foregoing pages, numbered from one (1) to Forty-three (43) inclusive, contain full, true and correct copies of the record and of the assignment of errors and of all proceedings in the case of Quong Wing, Plaintiff in error, vs. Thomas B. Kirkendall, As Treasurer of the County of Lewis and Clark, State of Montana, including a copy of the opinion of the Supreme Court of the State of Montana, and of the bond on the writ of error herein, and I further certify that the original of said bond was duly filed in my office on July 6th, 1909; and that there are attached hereto the original writ of error and citation, with due proof of service thereof endorsed on each thereof; all of which is herewith transmitted to the Supreme Court of the United States in obedience to the said writ of error.

Witness my hand and the seal of said Court this 19″ day of August, 1909.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

Endorsed on cover: File No. 21,804. Montana Supreme Court. Term No. 119. Quong Wing, plaintiff in error, vs. Thomas B. Kirkendall, as treasurer of the county of Lewis and Clark, State of Montana. Filed August 26th, 1909. File No. 21,804.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

QUONG WING,

Plaintiff in Error,

vs.

THOMAS B. KIRKENDALL, As Treasurer of Lewis & Clark County, State of Montana,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

This action involves the question of the constitutionality of the statute of Montana requiring a license fee of ten dollars from males operating hand laundries and exempting certain other persons who also operate laundries.

Plaintiff in Error filed his complaint against Defendant in Error, in the District Court of Lewis & Clark County, Montana, alleging:

That Plaintiff in Error is, and was at all times therein mentioned, a resident of Lewis & Clark County,

Montana, and engaged in the business, in said County, of "washing, drying and ironing and otherwise laundering wearing apparel, linens, and other clothing and cloth goods, for hire."

Record Page 1.

That Plaintiff uses only hand power in said laundry and is a male preson and employs only male persons in said laundry business.

Record Pages 1 and 2.

That Defendant in Error was at all the times mentioned in the complaint, the Treasurer of said County, and demanded a fee of $10.00 of plaintiff for the privilege of conducting his said hand laundry business during the period of three months from and after July 17th, 1908.

Record Page 2.

That Plaintiff paid this fee under duress, and as allowed by the statute, under protest.

Record Page 2.

That said money was so demanded and collected for the purpose of defraying the "general governmental expenses of said County of Lewis and Clark and of the State of Montana, and for no other purpose."

Record Page 2.

That there are divers other persons engaged, in

said County of Lewis & Clark, in the same business as Plaintiff in Error, except that such persons use steam power to propel the implements used in said business.

Record Page 2.

That none of such persons are required to pay for the privilege of conducting such business.

Record Page 2.

That there is no difference between the business conducted by Plaintiff and that conducted by such other persons, except that Plaintiff uses hand, steam power.

Record Page 3.

That there are women engaged in the same identical business as plaintiff, in said County of Lewis & Clark, and who pay nothing for the privilege.

Record Page 3.

That the said sum of $10.00 was collected from Plaintiff in Error under the provisions of Section 2776 of the Revised Codes of Montana, which provides:

"Every person engaged in laundry business, other than the steam laundry business, shall pay a license of Ten Dollars per quarter, provided that this act shall not apply to the women engaged in the Laundry business, where not more than two women are engaged or employed or kept at work, and said license shall be for one place of business only."

Record Page 3.

That there is no other law in Montana requiring the payment of a license fee for the privilege of conducting any kind of a laundry business.

Record Page 3.

That said Section is repugnant to the United States Constitution and therefore void, for the reason that Plaintiff in Error is denied the equal protection of the laws.

Record Page 3.

To this complaint Defendant in Error filed a general demurrer, which demurrer was overruled by the District Court and judgment entered for Plaintiff in Error.

Record Pages 4 and 5.

Defendant in Error thereafter appealed to the Supreme Court of Montana, and the decision of the District Court was reversed by the Supreme Court.

Record Pages 5-11.

Plaintiff in Error thereafter filed his motion for rehearing which was by the Court denied.

Record Page 11.

The case now comes before this Court upon Writ of Error to the Supreme Court of Montana.

Record Pages 12-18.

Section 8602, Revised Codes of Montana, provides that any person doing business without a license where

a license is required by law, is guilty of a misdemeanor. The penalty for a misdemeanor is not more than six months in jail or a fine of not more than $500.00 or both such fine and imprisonment. Section 8111, Revised Codes of Montana.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Montana erred in reversing the judgment of the District Court of Lewis & Clark County, Montana, and in directing said District Court to sustain the demurrer to plaintiff's complaint.

2. The Court erred in holding that the taxation of hand laundries operated by males and in which only males are employed, and the exemption of all other laundries from such taxation, is not an unconstitutional discrimination, and in holding that Section 2776 of the Revised Codes of Montana is not violative of the Fourteenth Amendment of the Federal Constitution.

The sole question presented is whether Section 2776 of the Revised Codes of Montana provides a proper classification for taxing purposes.

We desire to call attention at the outset to the fact that Section 2776, supra, is a revenue measure simply, and is not an exercise of the police power.

This is alleged in the complaint (Record P. 2) and was conceded by the Montana Supreme Court. (Record P. 8). There is therefore no question of the reasonableness of a police regulation, but the only question to be decided is whether the taxation of hand laundries operated by males and the exemption of other laundries is a just, reasonable and proper classification for taxation purposes.

Classification for any purpose must be based upon some real and reasonable difference in the property or business placed in one class from the property or business which is exempted from burdens imposed upon such class; otherwise such classification is repugnant to the equal protection clause of the Federal Constitution.

Yick Wo vs. Hopkins, 118 U. S. 356.

Connolly vs. Union Sewer Pipe Co., 184 U. S. 540.

Gulf Ry. Co. vs. Ellis, 165 U. S. 155.

Bearing that in mind, therefore, what acceptable reason can be assigned for taxing the man who employs male persons to wash clothes in a tub and push a flat iron, and excusing the man who employs males and females to feed washing to a washing machine run by steam and take them out when washed? What difference does it make whether his employees push a flat iron over the rough dried clothes, or whether he feeds them into steam heated rollers and then finishes them

with an iron? It would seem that the logical difference would be that the man using the steam machinery would be required to pay the fee, and if any one were excused it would be the hand laundryman.

If such arbitrary selection as that attempted by the statute under consideration can be justified, we fail to see any limit to which such selection might go. The same principle might be extended to the point where the entire burden of taxation might be placed upon one portion of a class. A license fee for police regulation is limited to the necessities of the regulation, but if a revenue measure of this kind can be justified to the extent of $10.00, it could be justified to the point of confiscation of all of ones property, or of forcing him out of business.

The late Hiram Knowles, while Federal District Judge in the District of Montana, held void the statute of Montana which at that time required hand laundries to pay $25.00 per quarter while steam laundries were required to pay only $10.00 per quarter.

In re Yot Sang, 75 Fed. 983.

The language of Judge Knowles in that case, dealing as it does with questions involving statutory provisions which were practically the same as that now under consideration, except that the statutes considered by him did not exempt steam laundries but merely exacted a smaller fee, contains such a clear statement of the proposition which we are arguing that we here quote at considerable length from his opinion.

"Unless there is something so different in conducting of a laundry by steam to that of the carrying on of that business by any other means, the law providing a different and more excessive license for the conducting of such business other than by steam is unequal and unjust. It is not claimed that the mode of carrying on a laundry by means other than steam is more dangerous to health than a steam laundry, or that it is more conducive to the spread of fire. It is not perceived that this enacting a different license for one mode of conducting such a business from that imposed upon the other is in furtherance of the well-recognized police power of the state. It may be said that the state may have wished to encourage steam laundries. If so, it had no right to do it at the expense of any person carrying on such a business other than by means of steam. Such an argument would imply that it was in the power of a state to force a man who conducted a business in one mode to abandon the same in order that he who conducted such business in another mode would be encouraged and built up. *The laundry business is the same whether conducted in one mode or in another.* If an additional burden can be placed upon a man because he conducts that business by means other than steam, of $10.00 per quarter, then it could be advanced to $1000 a quarter (P. 985). (Italics ours)."

The exemption of steam laundries from the payment of this fee is about as reasonable as taxing the stock in trade of a grocer who uses an old fashioned

money till, while a man who has a fancy cash register escapes entirely; or that a man conducting a grocery business of $100,000 per year and using delivery wagons drawn by horses to deliver his goods could be required to pay tax upon such business, while his competitor across the street who does the same amount of business but using auto delivery wagons escapes without paying anything; or taxing a man who is engaged in digging dirt with a pick and shovel while a man operating a steam shovel pays nothing.

If it is the *business* which is being taxed the instrumentalities used in that business make no difference, except that the tax might be graded according to the amount of business done, while if the tax is upon the *instrumentalities,* that would be another matter. In this case it is the *laundry business* which is the basis of the tax.

Nor is there any reason for exempting women in the manner in which it is attempted under this statute. A woman in business is, from a taxation standpoint, subject to the same burdens as a man in the same business.

The Montana Supreme Court referred at length to the decision of this Court in the case of Muller vs. Oregon, 28 Sup. Ct. Rep. 324, as supporting the proposition that the exemption of women was proper. We respectfully submit, however, that that case is not authority for the decision of the Montana Court. It must be remembered that the law under consideration here

is a revenue measure, and has nothing to do with the *police power* of the State. The statute involved in the Muller case limited the hours of labor of females in laundries and similar places, and was purely a health regulation; and this Court upheld it upon the ground that it was a reasonable exercise of the power of the State to protect the health of its citizens.

And so we ask what the payment of a *revenue* license fee has to do with the health of an employee? It would be as reasonable to say that a law would be upheld which exacted a license tax for revenue purposes from males engaged in retail merchandise business and exempted women engaged in the same business. To go a step farther, it would be as reasonable to exempt women owning any property from paying any taxes thereon. The law by its terms exempts certain "women *engaged in laundry business*". What difference is there between a woman engaged in laundry business and one engaged in the retail grocery business from the standpoint of taxation?

In short, the only reasonable basis of classification in this case is the *laundry business*.... Upon the record (the allegations of the complaint being taken as true for the purpose of the demurrer) there is absolutely no reason why hand laundries should be taxed and other laundries exempted.

The decision of this Court in the case of Connolly vs. Union Sewer Pipe Co., supra, is controlling here, and establishes the principle for which we are contend-

ing. It will be unnecessary for us to refer at length to the text of that decision, but the statement of the Court that "In prescribing regulations for the conduct of trade, it (the State) cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class *engaged in the same domestic trade* to do the same things with impunity" strikes the key-note of this case. The law under consideration permits certain persons engaged in *laundry business* to operate without paying for the privilege; while certain persons engaged in the same business are required to pay for the privilege and are declared to be criminals if they do not do so. Is there any more reason apparent for this discrimination than there was for that denounced in the Connolly case?

The principle applied in the *Connolly* case has been repeatedly announced by this Court.

In Barbier vs. Connolly, 113 U. S. 27, it was said that "no impediment shall be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the *same calling and condition.*"

Ex parte Virginia, 100 U. S. 339.

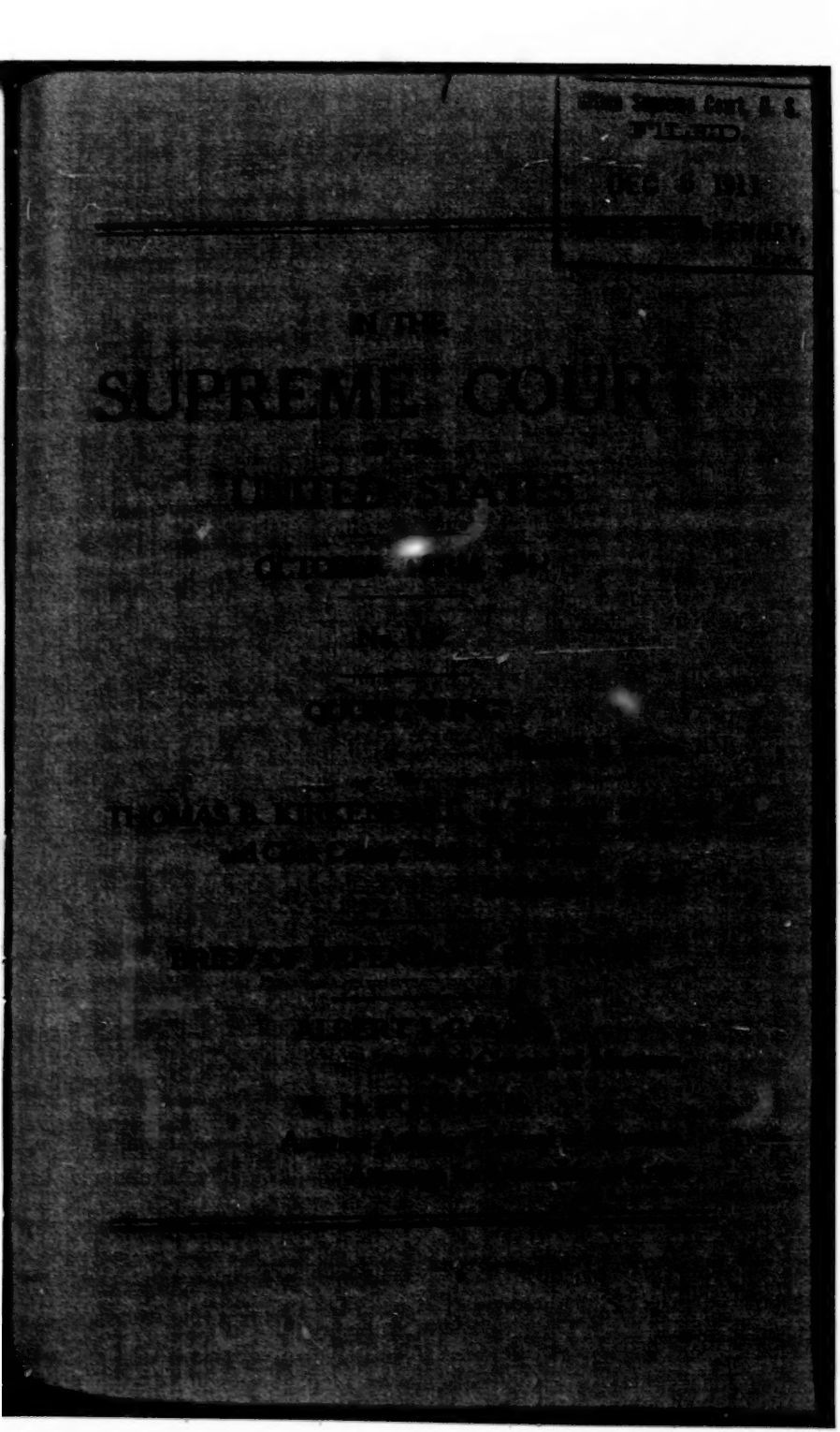
We submit that the statute under consideration is clearly violative of the equality clause of the Federal

Constitution and that the decision of the Supreme Court of Montana must be reversed.

Respectfully submitted,

M. S. GUNN,
Attorney for Plaintiff in Error.

IRA T. WIGHT,
CHARLES E. PEW,
Of Counsel.



IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1911

QUONG WING,

Plaintiff in Error,

vs.

THOMAS B. KIRKENDALL, as Treasurer of Lewis and Clark County, State of Montana.

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

During the year 1908 the plaintiff in error, upon the demand of the defendant in error, paid under protest to said defendant in error the sum of ten ($10) dollars as a license for conducting a laundry business other than a steam laundry business in said county for the period of three months. Thereafter, and within the time required by law, the plaintiff in error instituted an action in the district court of said county for the recovery of the money so paid under protest. Judgment of the district court was duly made and given in favor of the plaintiff in said action, and an appeal was there-

upon taken by the defendant, Kirkendall, to the supreme court of the State of Montana, where the judgment of said district court was reversed and the cause remanded (39 Mont. 64), and the cause is now brought to this court on Writ of Error.

The Constitution and laws of the State of Montana involved in this cause read as follows:

> "Sec. 1, Art. XII, St. Const.: The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."
>
> Sec. 2776, Revised Codes: "Every person engaged in laundry business, other than the steam laundry business shall pay a license of Ten Dollars per quarter *provided* that this Act shall not apply to the women engaged in the laundry business, where not more than two women are engaged or employed or kept at work, and said license shall be for one place of business only."

QUESTIONS PRESENTED.

The specification of errors contained in brief of plaintiff in error, on page 5, is to the effect that the supreme court erred in directing the district court to sustain the demurrer to the complaint, and that the supreme court erred in holding that said Sec. 2776 of the Revised Codes of Montana is not an unconstitutional discrimination and violative of the Fourteenth Amendment to the Federal Constitution.

BRIEF AND ARGUMENT.

The questions involved in this case were very exhaustively discussed by the supreme court of Montana in considering

the case when before that tribunal, and we here refer to that decision and discussion without making quotations therefrom,

Quong Wing v. Kirkendall, 39 Mont. 64

and to re-state the questions involved:

The legislature enacted a law to the effect that every male person who operated a laundry other than by steam within the state shall pay a license of ten dollars per quarter, and that neither the same person nor any other person is required to pay any license for operating a laundry by steam. Does this statute violate the "equal protection of the laws" clause of the Fourteenth Amendment to the United States Constitution?

As we understand the brief of plaintiff in error, the main questions there discussed is that the legislature by this law made a classification of persons or business for taxation, and that such classification so made is not waranted, or rather, is in violation of the provisions of the Fourteenth Amendment. As intimated by the supreme court of the State of Montana in considering the case, there is no classification here. The legislature, in the exercise of its authority given to it by the state constitution, simply imposed a license tax on a certain occupation, to-wit: laundries operated in any other way than by steam. This is not a classification, but is simply the exercise of constitutional authority in complying with the mandates of the state constitution above quoted, which makes it the duty of the legislature to provide the necessary revenue for the support and maintenance of the state. The statute applies equally to all male persons. No distinction is made as to race or color. No discrimination is stated or implied. It "requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances."

Kentucky Railway Tax Cases, 115 U. S. 321.
Magoun v. Ills. T. & S. Bank, 170 U. S. 283 (293).

"It simply requires that all persons subjected to such legislation shall be treated alike in like circumstances and conditions, both in the privilege conferred and the liabilities imposed."

Magoun v. Ills. T. & S. Bank, Supra.
Hayes v. Missouri, 120 U. S. 68.

The authority of the state legislature to impose a license tax is conferred by the state constitution above quoted, and that right has been many times affirmed by the highest court of the state.

State v. French, 17 Montana, 56.
State v. Camp Sing, 18 Mont. 129.

And this court has so many times affirmed the right of a state to impose a license tax on trades, occupations or professions, that the question is not longer open to discussion.

"No doubt can be entertained of the right of a state legislature to tax trades, professions or occupations in the absence of inhibition in the state constitution in that regard."

Ficklen v. Shelby County Taxing District, 145 U. S. 1.

The state "may if it chooses exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only and not securities; may allow or not allow deductions for indebtedness.

'All such regulations and those of like character; so long as they proceed within reasonable limits and general usage

are within the discretion of the state legislature or the people of the state in confirming their constitution.' "

Connelly v. Union Sewer Pipe Co., 184 U. S. 562.

Further on in the Connelly decision, this court having previously referred to *Magoun v. Ills. T. & S. Bank*, 170 U. S., 283, and *American Sugar Refining Company v. Louisiana*, 179 U. S. 89, said:

> "It is sufficient to say that these cases had reference to the taxing power of the state and involve considerations that could not in the nature of things apply to a state enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exercised has been adjudicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain calling or trades or when the state exercises its power to tax it is not bound to tax all pursuits or all property that may legitimately be taxed for government purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the state. The state may, in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States so long as the classification does not invade the rights secured by the constitution of the United States."

In *Armour Packing Company v. Lacy*, 200 U. S. 226, 235, this court, after again affirming the doctrine that the construction of a state statute is not open to review, quoted at length from *Osborne v. Florida*, 164 U. S. 650.

" 'The Act in question does not deny petitioner the

> equal protection of the laws as the tax is imposed upon the managing agent both of domestic and of foreign houses. * * * There is no discrimination in favor of the agents of domestic houses, and while we may suspect that the act was primarily intended to apply to agents of ultra state houses, there is no discrimination upon the face of the act and none so far as the record shows upon its practical administration. As we have frequently held, a state has the right to classify occupation and to impose different taxes upon different occupations. Such has been constantly the practice of courts under the internal revenue laws. (Cook v. Marshall County, 196 U. S. 261, 275).
>
> What the necessity is for such tax and upon what occupations it shall be imposed, as well as the amount of the imposition are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here.' "

In McLean v. Arkansas, 211 U. S. 539, 547, this court had under consideration a statute of the State of Arkansas relating to coal mining, which made penal certain acts, but the provision of the statute applied only to coal mines operated in a certain manner and with over a certain number of miners, and it was claimed that this was a violation of the "equality clause" of the Fourteenth Amendment. This court, after a comprehensive discussion of the principles involved and the citation of numerous authorities, sustained the statute and said, in part:

> "The legislature being familiar with local conditions is primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question in unmistakably and palpably in excess of legislative power (*Jacobson v. Massachusetts*, 194 U. S. 11; *Mugler v. Kansas*,

123 U. S. 623; *Minnesota v. Barber*, 136 U. S. 313, 320; *Atkin v. Kansas*, 193 U. S., 207, 223".

It cannot be successfully maintained that the plaintiff in error, as a citizen or as a resident of the United States or elsewhere, is guaranteed by the federal constitution any right to transact any business in any state without the payment of a license where the state law of such state under authority granted by the state constitution imposes a license upon other persons engaged in the same class of business under like conditions. Hence, there can be no claim maintained here that the "United States Citizenship" of anyone is invaded by the state law, for this law makes no distinctions or discriminations except as the same relates to women, which will be later here considered.

Twining v. State of New Jersey, 211 U. S. 78.
Maxwell v. Dow, 176 U. S. 581.
Slaughter House cases, 16 Wall. 36.

Neither can it be successfully maintained that the purpose of this law is to discriminate against the subjects of the Emperor of China, for no such motive is apparent on the face of this law, nor is there anything in its practical application that would lead to such a conclusion. The law by its terms operates equally upon all male persons, and by its exemptions operates equally upon all female persons.

This court heretofore, in considering similar arguments, said:

> "There is nothing, however, in the language of the ordinance or in the record of its enactment which in any respect tends to sustain this allegation, and the rule is general with reference to the enactments of legislative bodies, that the courts cannot inquire into the motive of the legislators in passing them except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and necessity of legislation. The

> motives of the legislators considered as to purposes they had in view will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactment. Their motives considered as the moral inducements for their votes will vary with the different members of the legislative body. The diverse character of such motives and the impossibility of penetrating into the hearts of man to ascertain the truth precludes all such inquiries as impracticable and futile."
>
> Soon Hing v. Crowley, 113 U. S. 703, 710.

This section of the Revised Codes of Montana is not as seems to be indicated in the brief of plaintiff in error, directed against hand laundries, but it is, so far as its license or taxation feature is concerned, directed against all laundries not operated by means of steam. It is, therefore, directed against laundries operated by electric power, water power, horse power or hand power or by any other power except steam power.

And we apprehend that the term "steam laundry" may have reference to a *process* of cleaning and drying clothes, rather than the motive power that operates or propels the machinery, and this may be what the legislature had in mind when this license law was enacted.

We can here investigate neither the wisdom nor the expediency of this legislation, nor can we go beyond the statute itself to inquire into the motives which impelled its enactment.

> "The legislature probably had some good reason for exempting steam laundry proprietors from the payment of license either permanently or for the time being."
>
> Quong Wing v. Kirkendall, 39 Mont. 64, 69.

Discrimination as between persons having equal facilities for profit is not objectionable.

> See St. Louis v. Wehrung, 46 Ills. 392.

And if we regard this statute as making a classification we still cannot go beyond that which appears on the face of the statute itself, for a court, in deciding a question of law cannot institute inquiry as to the particular facts and conditions existing in the jurisdiction where the law was enacted, and which facts and conditions were within the knowledge of the legislature enacting the law, and which most probably influenced the enactment of the legislation complained of.

There is no precise application of the rule of reasonableness or classification, and the rule of equality permits many practical inequalities; and necessarily so. In a classification for governmental purposes there cannot be any exact exclusion or inclusion of persons and things.

Magoun v. Ills. T. & S. Bank, Supra.
Clark v. Titusville, 184 U. S. 329.

The three particular cases relied upon by plaintiff in error and which are cited on page 6 of plaintiff's brief do not apper to us to be in point.

Yick Wo v. Hopkins, 118 U. S. 356, involved the question as to the right of a city or county to confer upon its board of supervisors an arbitrary and exclusive power to say who could conduct a laundry business, and this court HELD that such arbitrary power could not be legally conferred upon any board because such power places it within the discretion of such board to violate, at will, the equality clause of the Fourteenth Amendment. This case did not involve any principle of taxation or of license.

Connelly v. Union Sewer Pipe Co., 184 U. S. 540, was an action calling in question the statutes of Illinois of 1893, relating to trusts. This statute, by its terms, penalized all combinations in restraint of trade—and limited or reduced production, or increased or reduced prices—to prevent competition in manufacturing, making, transporting, selling or purchasing of merchandise, products, or commodities, etc.,

but exempted from the act two classes of persons, to-wit: agriculturalists and livestock raisers as to their products in their hands. It thus permitted these two classes of persons to do the very thing which it declared criminal for anyone else to do. This court HELD that such a law was an invasion of the equality clause of the Fourteenth Amendment. No questions of taxation or of license was involved in this case, but the court, in effect, held that the same act could not be declared criminal in one individual and commendable in another individual.

In *Gulf Railway Co. v. Ellis*, 165 U. S. 150, 155, which involved the construction of a Texas Statute, which gave to the successful litigant for stock killed by a railway company the right to tax an attorney fee against the railway company, but denied to the company such right when it was successful in the litigation, the court HELD such actions were mere actions of debt and that 'the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are obligatory upon all debtors" and that such punishment was not visited by reason of any act of commission or of omission on the part of the railway company that were not equally prohibited as to all parties, and that the statute was not a "classification" but an "arbitrary selection" and as such was forbidden by the "equality protection demanded by the Fourteenth Amendment." No question of taxation or of license was involved in this case, but the court merely held that a violation of duties which were equally obligatory upon all persons could not be punished as to one class of persons and not punished as to the other classes.

In the case of *In re Yot Sang*, 75 Fed. 983, Judge Knowles of the Montana District, in considering a statute in some respect similar to the one under consideration, except that under that law steam laundries paid a license of fifteen

dollars per quarter, and all other laundries paid a license of ten dollars per quarter, entered into considerable of a discussion as to the different methods or modes of conducting a laundry business, questions which relate wholly to the legislative department of the government, and with which the judicial department, as such, can have no information unless the same appears upon the face of the law being considered. This decision also goes further and intimates that the purpose of the law in imposing a license tax upon laundries operated other than by steam was "to force a man who conducted a business in one mode to abandon the same in order that he who conducted such business in another mode would be encouraged and built up."

The fallacy of this reasoning lies in the fact that neither that statute then considered, nor the present one, contains any prohibition against any person engaged in the steam laundry business or any other kind of laundry business that might appeal to his fancy or profit; it simply provides that if he conducts a laundry business in the manner provided by the statute he must pay a license therefor. As decided by this court in *Armour Packing Co. v. Lacy, Supra*, and in *Soon Hing v. Crowley, Supra*, neither the wisdom nor the expediency of the legislation can be inquired into, nor can the motives of the legislature be made the subject of inquiry except where the illegality appears in the act itself.

But it seems to be maintained by the plaintiff in error that the fact that under the law women engaged in the laundry business, other than the steam laundries, are exempt from the payment of the tax is an arbitrary and unlawful classification which vitiates the entire legislation and invades the province of the Fourteenth Amendment. There are many laws in the State of Montana which, on their face, are, apparently, unequal as to all classes of persons, but are equal as to the particular class to whom they relate. For instance

there is a much higher license demanded for the sale of intoxicating liquors by retail than for the sale of such liquors by wholesale. It might be argued that this business was the same in both cases, to-wit: the sale of liquor, and that, therefore, it is a violation of the equality clause of the Fourteenth Amendment to permit one man to sell liquor by the payment of one license and to compel another man to pay a higher license for the sale of the same liquor. And it is not an answer to this argument to say that this is the exercise of the police power, for if this constitution requires absolute equality as to all classes in the sale of the same character of goods, then the state could not, by calling its law police regulation, or sanitary regulation, or any other regulation, violate the federal constitution. Under the law of Montana, no man may sell his real estate and give absolute title thereto unless his wife joins with him in the conveyance, while the wife may sell her real estate without her husband joining. This might also appear to be an inequality. It is also provided in the Montana law that the wife shall be endowed with the one-third part of all the real estate of which her husband died seized, and he cannot, by will or otherwise, deprive her of this one-third part, and under the same law it is within the power of the wife, either by conveyance or will, to absolutely deprive her husband of any part of her real estate. This may also appear to be an inequality, yet we can hardly imagine that such laws would be attacked on such ground.

The right of the state to exempt women from the operation of this law is so ably set forth in the decision of this court in *Mullar v. Oregon*, 208 U. S., 412, and also in the decision of the supreme court of Montana in deciding this case, and reported in 39 Mont. 64-70, that we will not spend any further time in discussing that question.

Whether the license required by this state law is a license

tax, strictly speaking, or a revenue tax is immaterial, for the legislature has authority under the state constitution to resort to either or both methods in raising revenue, and it also has the authority to resort to the license system as a method of regulation, or as a proper exercise of the police power, and the license tax, whether imposed for regulation or for revenue, is not controlled by the equality or uniformity requirements of the constitution.

State v. Franch, 17 Mont. 54.

For the reasons above stated and upon the authorities there cited, we respectfully submit that the decision of the supreme court of the State of Montana in sustaining the validity of Sec. 2776 of the Revised Codes of Montana of 1907, and in sustaining the validity of the levy and collection of the license involved in this action should be sustained.

Respectfully submitted,

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QUONG WING *v.* KIRKENDALL, TREASURER OF LEWIS AND CLARK COUNTY, MONTANA.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 119. Argued December 18, 1911.—Decided January 22, 1912.

A State does not deny equal protection of the laws by adjusting its revenue laws to favor certain industries.

A State, like the United States, although with more restrictions and to a less degree, may carry out a policy even if the courts may disagree as to the wisdom thereof.

In carrying out its policy, a State may make discriminations so long as they are not unreasonable or purely arbitrary.

On the record as presented in this case, and without prejudice to determining the question, if raised in a different way, the statute of

Montana imposing a license fee on hand laundries does not appear to be an unconstitutional denial of equal protection of the laws because it does not apply to steam laundries and because it exempts from its operation laundries not employing more than two women.

The Fourteenth Amendment does not interfere with state legislation by creating a fictitious equality where there is a real difference.

Quære: Whether this statute is aimed directly at the Chinese, in which case it might be a discrimination denying equal protection.

When counsel do not bring the facts before it, the court is not bound to make inquiries.

Courts sometimes enforce laws which would be declared invalid if attacked in a different manner.

39 Montana, 64, affirmed.

THE facts, which involve the constitutionality of a laundry license act of Montana, are stated in the opinion.

Mr. Charles E. Pew, with whom *Mr. M. S. Gunn* and *Mr. Ira T. Wight* were on the brief, for plaintiff in error:

The sole question presented is whether § 2776 of the Revised Codes of Montana provides a proper classification for taxing purposes.

Section 2776 is a revenue measure simply, and is not an exercise of the police power. This is alleged in the complaint, and was conceded by the Montana Supreme Court. There is therefore no question of the reasonableness of a police regulation, but the only question to be decided is whether the taxation of hand laundries operated by males and the exemption of other laundries is a just, reasonable and proper classification for taxation purposes.

Classification for any purpose must be based upon some real and reasonable difference in the property or business placed in one class from the property or business which is exempted from burdens imposed upon such class; otherwise such classification is repugnant to the equal protection clause of the Federal Constitution. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Gulf Ry. Co.* v. *Ellis*, 165 U. S. 155.

If such arbitrary selection as that attempted by this statute can be justified, there is no limit to which such selection might go. The same principle might be extended to the point where the entire burden of taxation might be placed upon one portion of a class. A license fee for police regulation is limited to the necessities of the regulation; but if a revenue measure of this kind can be justified as to a tax of $10.00, it can be justified to the point of confiscation.

Federal District Judge Knowles in the District of Montana held void the statute of Montana which at that time required hand laundries to pay $25.00 per quarter while steam laundries were required to pay only $10.00 per quarter. *In re Yot Sang*, 75 Fed. Rep. 983.

If it is the business which is being taxed, the instrumentalities used in that business make no difference, except that the tax might be graded according to the amount of business done, while if the tax is upon the instrumentalities, that would be another matter. In this case it is the laundry business which is the basis of the tax.

Nor is there any reason for exempting women in the manner in which it is attempted under this statute. A woman in business is, from a taxation standpoint, subject to the same burdens as a man in the same business.

Muller v. *Oregon*, 208 U. S. 412, is not an authority for the decision of the Montana court, the law under consideration here being a revenue measure, not a police measure. The statute involved in the *Muller Case* limited the hours of labor of females in laundries and similar places, and was purely a health regulation; and this court upheld it upon the ground that it was a reasonable exercise of the power of the State to protect the health of its citizens.

Mr. W. H. Poorman, with whom *Mr. Albert J. Galen*, Attorney General of Montana, was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover ten dollars paid under duress and protest for a license to do hand laundry work. The plaintiff got judgment in the court of first instance, but this judgment was reversed by the Supreme Court of the State. 39 Montana, 64. The law under which the fee was exacted imposed the payment upon all persons engaged in laundry business other than the steam laundry business, with a proviso that it should not apply to women so engaged where not more than two women were employed. 1 Rev. Codes, § 2776. The only question is whether this is an unconstitutional discrimination depriving the plaintiff of the equal protection of the laws. U. S. Const., Am. XIV.

The case was argued upon the discrimination between the instrumentalities employed in the same business and that between men and women. One like the former was held bad in *In re Yot Sang*, 75 Fed. Rep. 983, and while the latter was spoken of by the Supreme Court of the State as an exemption of one or two women, it is to be observed that in 1900 the census showed more women than men engaged in hand laundry work in that State. Nevertheless we agree with the Supreme Court of the State so far as these grounds are concerned. A State does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a State may carry out a policy, even a policy with which we might disagree. *McLean* v. *Arkansas*, 211 U. S. 539, 547. *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 235. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562. It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary, as was illustrated in *American Sugar Re-*

fining Co. v. *Louisiana*, 179 U. S. 89, 92, 95; *Williams* v. *Fears*, 179 U. S. 270, 276; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 469. It may favor or discourage the liquor traffic, or trusts. The criminal law is a whole body of policy on which States may and do differ. If the State sees fit to encourage steam laundries and discourage hand laundries that is its own affair. And if again it finds a ground of distinction in sex, that is not without precedent. It has been recognized with regard to hours of work. *Muller* v. *Oregon*, 208 U. S. 412. It is recognized in the respective rights of husband and wife in land during life, in the inheritance after the death of the spouse. Often it is expressed in the time fixed for coming of age. If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference. The particular points at which that difference shall be emphasized by legislation are largely in the power of the State.

Another difficulty suggested by the statute is that it is impossible not to ask whether it is not aimed at the Chinese; which would be a discrimination that the Constitution does not allow. *Yick Wo* v. *Hopkins*, 118 U. S. 356. It is a matter of common observation that hand laundry work is a widespread occupation of Chinamen in this country while on the other hand it is so rare to see men of our race engaged in it that many of us would be unable to say that they ever had observed a case. But this ground of objection was not urged and rather was disclaimed when it was mentioned from the Bench at the argument. It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be real. But even if when called to our attention the facts should be taken notice of judicially,

whether because they are only the premise for a general proposition of law, *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227, *South Ottawa* v. *Perkins*, 94 U. S. 260, *Telfair* v. *Stead*, 2 Cranch, 407, 418, or for any other reason, still there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account. Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed.

Judgment affirmed.

MR. JUSTICE HUGHES concurs in the result.

MR. JUSTICE LAMAR dissenting.

I dissent from the conclusions reached in the first branch of the opinion, because, in my judgment, the statute which is not a police but a revenue measure makes an arbitrary discrimination. It taxes some and exempts others engaged in identically the same business. It does not graduate the license so that those doing a large volume of business pay more than those doing less. On the contrary, it exempts the large business and taxes the small. It exempts the business that is so large as to require the use of steam, and taxes that which is so small that it can be run by hand. Among these small operators there is a further discrimination, based on sex. It would be just as competent to tax the property of men and exempt that of women. The individual characteristics of the owner do not furnish a basis on which to make a classification for

purposes of taxation. It is the property or the business which is to be taxed, regardless of the qualities of the owner. A discrimination founded on the personal attributes of those engaged in the same occupation and not on the value or the amount of the business is arbitrary. "A classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed." *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 560.